No. 02-1350

IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF UTAH, ALABAMA, KANSAS, NEBRASKA, TEXAS, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MARK SHURTLEFF*
ATTORNEY GENERAL
STATE OF UTAH
236 State Capitol
Salt Lake City, UT 84114
(801) 538-1191

Counsel for Amici Curiae

April 14, 2003

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

BILL PRYOR
ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130

JON BRUNING
ATTORNEY GENERAL
STATE OF NEBRASKA
2115 State Capitol
Lincoln, NE 68509

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL
STATE OF WEST VIRGINIA
1990 Kanawha Boulevard East
State Capitol, Room 26-E
Charleston, WV 25305

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. Tenth Avenue
Topeka, KS 66612

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
300 W. Fifteenth Street
Austin, TX 78711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES

OTHER AUTHORITY

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITIES Page

STATEMENT OF INTEREST

Amici Curiae are the States of Utah, Alabama, Kansas, Nebraska, Texas, and West Virginia (collectively, *Amici* or "*Amici* States"). They each have significant public land holdings, both urban and rural. The land holdings of *Amici* and their municipal subdivisions are vast and varied, and constitute vitally important State assets. They include government buildings and their grounds; public streets and sidewalks; urban parks, open spaces, and other urban lots; and State parks, recreation trails, and memorial areas, to name but a few. For example, nationwide there are approximately 5,616 State parks totaling 13 million acres and 3,963 State trails encompassing 26,337 miles.

Amici have a strong interest in preserving the value of these assets and the ability of States to encourage economic development, fund public education, and increase public revenues through the sale of state-owned real estate. State and local governments are vested with the power to sell public lands for the benefit of their citizenry, and they regularly do so. It is not uncommon in connection with such sales for States and their municipalities to reserve limited easements or impose other regulations that promote the public good by ensuring public access, much as occurred here.

The decision below creates significant uncertainty and confusion about the power of State governments to sell public forum property, or to guarantee public access to private property, without maintaining or creating public forum rights. This Court's review is necessary to clarify public forum law and to ensure that the market value of vital public assets and the ability to obtain public access rights to private property are not destroyed by the Tenth Circuit's overly rigid interpretation of public forum doctrine.

REASONS FOR GRANTING THE PETITION

In addition to the reasons set forth in the Petition, this case warrants the Court's review because it seriously disrupts the ability of State governments to manage their vast land holdings in the best interests of the public. To raise funds, promote development and renewal, and advance a variety of other important governmental interests, State governments frequently sell public land to private individuals. In connection with such sales, it is not uncommon for the government to reserve (or later acquire) limited public access easements. These sales often involve sections of public parks, streets, and sidewalks that have traditionally been considered public forums. The ability of the government to completely close such public forums is essential to the sale of public land because private buyers will not pay full market value for a protest zone – indeed, many will not pay anything at all.

In the decision below, the Tenth Circuit established a test for determining whether a public forum continues to exist on former government property. However, that test is so narrow in its focus and ignores so many highly relevant factors that it will inevitably result in many private properties purchased from the government being declared public forums. The decision below is certain to hinder or prevent land sales that are clearly in the best interest of the public. More broadly, review is warranted to resolve the conflicts and clarify the substantial confusion that the court below has created over the proper standard for terminating a public forum.

I. THE TENTH CIRCUIT'S DECISION DISRUPTS STATE PROPERTY LAW AND SIGNIFICANTLY IMPAIRS THE TRADITIONAL POWER OF STATE GOVERNMENTS TO SELL PUBLIC PROPERTY AND TO PURCHASE OR ACQUIRE EASEMENTS OVER PRIVATE LANDS.

In all material respects, the transaction between the City and the Church is unremarkable. The City closed a segment

of a public street, sold it for fair market value to a private entity for development, and retained an easement preserving a limited right allowing the public to traverse the property. In one form or another, such transactions are common. As some of the largest landowners in the country, State governments routinely sell portions of streets, parks, and other public lands to private entities to advance a variety of important government interests. In connection with such sales, governments frequently retain public access easements or impose public access conditions. Likewise, governments often purchase or acquire limited access easements from private landowners to facilitate public access and passage (both pedestrian and vehicular) to adjoining government properties or places of public interest. As a result, public access easements over private property are common, especially throughout the western United States.

What *is* remarkable, however, is the Tenth Circuit's unprecedented holding that – regardless of the intent of the government and the private landowner, regardless of the terms of an easement, and regardless of the nature and use of the burdened land and the surrounding properties – a simple easement expressly limited to public access and passage can transform otherwise private property into a public forum. Review is necessary because this decision disrupts well-established principles of property law and creates uncertainty and practical difficulties for State governments. At a minimum, given the very real risk that a government land transaction will create a disruptive public forum, any such transaction in the Tenth Circuit, especially one that involves a public access easement, will now be much more difficult and expensive. In many cases, such transactions will now be impossible.

A. The Decision Below Disrupts Settled Principles Of State Property Law That Give State Governments The Power Both To Sell Public Property And To Limit The Burdens Imposed On Private Property Owners By Public Easements.

There can be no doubt that a State government, like any other property owner, generally has the right to sell public property to a private purchaser. See Utah Code Ann. § 65A-4-1(1) ("All state agencies may acquire land . . . and are authorized to sell, lease or otherwise dispose of land no longer needed for public purposes . . . ."); *id*. § 53C-4-101(1)(a) (requiring director of School and Institutional Trust Lands Administration to establish criteria for the "sale, exchange, lease or other disposition or conveyance of trust lands"); *id*. § 53C-4-102(2)(a) (requiring SITLA director to determine "whether disposal or retention of all or a portion of a property interest in trust lands is in the best interest of the trust").[1] And, like any other property owner, a State government, under bedrock principles of property law, has the power to limit the scope of a government-owned easement to specified subjects. See *Restatement (Third) of Property: Servitudes* § 2.18(2) & cmt. b (2000) ("the right to control a [government-owned] servitude for the benefit of the public is located in the state," and not in individual citizens who may disagree with the government's property management style).

[1] See also Ala. Code § 9-15-72 (state agencies are authorized to sell real property holdings through the Lands Division of the state Department of Conservation); Kan. Stat. Ann. § 32-804 (state park and resources authority is authorized to dispose of real property or any interest therein); *id.* § 68-423a (state Secretary of Transportation is authorized to dispose of by sale any real property formerly a road or highway); Neb. Rev. Stat. § 39-1325 (state Department of Roads is authorized to sell "any part of or any interest in real property" that it holds); Tex. Gov't Code Ann. § 2166.052 (state legislature may authorize state general services commission to sell real property holdings of the state); W. Va. Code § 17-2A-19 (state Division of Highways may sell real property, "or any interest or right in the property," that it holds).

That is true, moreover, whether the state government acquires an easement from an existing property owner, or, as in this case, simply retains an easement as part of a sale of public property to a private entity. See Jesse Dukeminier & James E. Krier, *Property* 834 (2d ed. 1988) (no legal difference between easements created by reservation and those created through an independent conveyance).

Nevertheless, the decision below essentially declares irrelevant the undisputed fact that the deed creating the easement here was specifically drafted to preclude the interpretation that it allows the public to use the property for expressive purposes. In refusing to give any weight to that critical fact, the Tenth Circuit has significantly disrupted basic principles of property law governing public easements – much to the detriment of state and local governments throughout that court's territorial jurisdiction.

1. One of the bedrock principles of State property law is that an easement creates "a nonpossessory right to enter and use land in the possession of another" and that it only "obligates the possessor not to interfere with the uses authorized by the easement." *Restatement (Third) of Property: Servitudes* § 1.2(1). The benefit associated with an easement is considered a "nonpossessory" interest in land because it "generally authorizes limited uses of the burdened property *for a particular purpose*." *Id*. § 1.2 cmt. d (emphasis added). Moreover, while the owner of an easement "is entitled to make *only* the uses reasonably necessary for the specified purpose," the owner of the possessory or "servient" estate "retains the right to make all uses of the land that do not unreasonably interfere with exercise of the rights granted by the" easement. *Id*. (emphasis added); see *Weggeland v. Ujifusa*, 384 P.2d 590, 591 (Utah 1963) ("The accepted rule is that the language of the grant is the measure and the extent of the right created; and that the easement conveyed should be so construed as to burden the [possessory] estate only to the

degree necessary to satisfy the purpose described in the grant.").

Thus, under settled state-law principles, an easement is a limited interest in land "that carves out specific uses for the . . . beneficiary," but which allows "[a]ll residual rights [to] remain in the possessory estate." *Restatement (Third) of Property: Servitudes* § 4.9 cmt. c (emphasis added); *accord* 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 5.7(6), at 784 (2d ed. 1993) ("An easement in land is a right to use the land for limited purposes, not a right of possession."). In other words, the law presumes that the owner of the possessory estate retains every right not explicitly granted to the owner of the easement. See *Labrum v. Rickenbach*, 711 P.2d 225, 227 (Utah 1985) ("[T]he law in this state is plain: A right of way founded on a deed or grant is limited to the uses and extent fixed by the instrument.").[2] Were it otherwise, property owners would be most reluctant to allow easements on their property, particularly easements in favor of a government.

2. Disregarding the plain terms of the easement and these bedrock principles of State property law, the decision below invokes the easement at issue here as justification for imposing a disruptive public forum on the Church Plaza. This is obviously a significant intrusion into the City's prerogative to dispose of its own property as it sees fit. But it is also an enormous intrusion into the State's authority to establish property-law principles that will best serve the interests of the

[2] Moreover, where disputes arise as to the meaning of language granting an easement, courts construe that language to effectuate the apparent intent of the parties, paying particular attention to the overall purpose of the transaction. See *Wood v. Ashby*, 253 P.2d 351, 353 (Utah 1952) ("It is . . . established in this state that a deed should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed. . . . Further, when the deed creates an easement the circumstances attending the transaction, the situation of the parties, and the object to be attained are also to be considered."); *accord Stevens v. Bird-Jex Co.*, 18 P.2d 292, 294-95 (Utah 1933). The Tenth Circuit's decision vitiates this important principle as well.

State and its citizens. Indeed, unless the property-law principles adopted by Utah and virtually all other States are to be overridden entirely by the First Amendment, the easement at issue here is simply too limited a property interest to give the City's pedestrians the same rights on the Church Plaza as they have on public sidewalks.

First, nothing in the City's easement grants any free expression rights to members of the public, either expressly or by necessary implication. As noted, under settled property-law principles in general, and Utah property law in particular, the holder of an easement "is entitled to make *only* the uses reasonably necessary for the *specified* purpose." *Restatement (Third) of Property: Servitudes* § 1.2 cmt. d (emphasis added). The only use "specified" in the easement is pedestrian crossing. The ability to protest, demonstrate, distribute literature, and so forth is obviously not "reasonably necessary" for pedestrian crossing. There is no plausible argument that by its nature a pedestrian access easement includes the right to engage in the full range of expressive activities associated with a public forum.

In short, as the Nevada Supreme Court affirmed in *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001) (plurality opinion), under settled State law, privately owned property "does not lose its private nature because the public traverses upon it," and the "existence of [a pedestrian access] easement alone, without more, does not transform private property into a public forum." *Id.* at 247, 248. That is because, as noted, "'an easement obtained by a governmental entity for a public use is only as broad as necessary for the accomplishment of the public purpose for which the easement was obtained.'" *Id.* at 247 (quoting *Dixon v. City of Phoenix*, 845 P.2d 1107, 1114 (Ariz. Ct. App. 1992)). Accordingly, such an easement "is limited to pedestrian uses of the sidewalk to travel from point A to point B." *Id*. The Tenth Circuit's decision is a frontal assault on that settled State-law principle.

Even worse, the Tenth Circuit's decision deprives State and local governments of the freedom to determine by contract the scope of the easements they wish to obtain. In this case, the deed expressly states that the scope of the City's property interest does not include the right of the public to demonstrate, picket, distribute literature, or engage in other activities that would be protected by the First Amendment if carried out on public property. Indeed, the easement by its terms is limited to "pedestrian access and passage *only*." Pet. App. 87a (emphasis added). And it expressly states that nothing in it "shall be deemed to create or constitute a public forum, limited or otherwise." *Id*. at 88a, 89a. Because the language in the deed "leaves no doubt as to its meaning," the courts are powerless under settled Utah law (and the laws of virtually all other States) to "expand the terms of the easement." *Labrum*, 711 P.2d at 227. Here again, the Tenth Circuit's decision simply overrides settled State law.[3]

Finally, the decision below deprives State and local governments of the ability to control the interpretation and operation of their own easements. It is hornbook law that where, as here, the parties have not indicated otherwise, "the right to control a [government-owned] servitude for the benefit of the public" – *i.e.*, the "rights to transfer, terminate, . . . dispose of the servitude benefit, [and] to manage the servitude" – "is located in the state." *Restatement (Third) of*

---

[3] Even if the deed were ambiguous on this point, the court below should have construed it as not creating any expressive rights because to conclude otherwise is to disregard the settled proposition that an easement cannot be construed in a way that would be incompatible with the primary use of the possessory estate. See *Big Cottonwood Tanner Ditch Co. v. Moyle*, 159 P.2d 596, 597 (Utah 1945), *modified on other grounds*, 174 P.2d 148 (Utah 1946); *Restatement (Third) of Property: Servitudes* § 4.1. In this case, it is undisputed that the primary use of the Church's possessory estate is that of a religious plaza. And protests against the sponsoring religion would obviously be incompatible with that primary use. Nevertheless, the court below ignored these basic principles of property law and held that the easement created a public forum.

Property: Servitudes § 2.18(2) & cmt. b. By ignoring settled principles of property law and rejecting the City's reasonable construction of the limits of its own easement, the court below not only deprived the City of that right in this case, but has also, by implication, deprived other States and cities of that same right in future transactions.

Indeed, one of the ironies of the Tenth Circuit's decision is that it leaves State and local governments with far less control over property transactions than private parties. As noted, State law typically affords State and municipal governments express statutory authority to "purchase, receive, hold, sell, lease, convey, and dispose of real and personal property for the benefit of the municipality," and to "do *any other thing in relation to [such] property that an individual could do*." Utah Code Ann. § 10-8-2(1)(c) & (d) (emphasis added). Of course, individuals would have the ability to define and limit the terms of an access easement that benefits one and burdens the land of the other. But the Tenth Circuit has now denied that same power to a government landowner. To the contrary, it left the City of Salt Lake (and by implication other State and local governments) with an all-or-nothing proposition: either retain the easement and manage a full-blown public forum on private property or else relinquish the easement and forfeit any guarantee of public access. Pet. App. 9a-31a.

3. It is important to remember, moreover, that the decision below is *not* limited to extraordinary or problematic situations, such as where the government's actual purpose in entering into a property transaction is to suppress free speech or where no adequate alternative avenues of communication exist. It is undisputed that the City had no such intent and that there are large and effective areas for public protest and expression on the wide, public-forum City sidewalks immediately adjacent to the Plaza.

Rather, the decision below means that – regardless of the unequivocal terms of the easement, the clear contrary intent of the government and the private party, and the magnitude of

the abridgment of private property rights – the First Amendment automatically injects an irrevocable public forum clause in most government-owned public access easements. To be sure, the court of appeals stated that its holding did not mean that every easement creates a public forum. Pet. App. 13a n.5. But the court's narrow analysis, which (as explained in the Petition) excludes the most relevant considerations, would in most cases ensure that very outcome.

For all these reasons, the decision below represents a massive intrusion into State property law and the prerogatives of State and local governments to manage their affairs in the interests of their citizens. Accordingly, it warrants full review by this Court.

B. The Decision Below Will Significantly Hinder State Governments In Selling Public Lands And Purchasing Access Easements Over Private Property.

Amici States are also concerned about the decision below because of its practical impact on their ability to sell public lands and to purchase access easements. Robust public forums are no doubt vital to a democracy, but very few people desire to host one on their own private property. As this case demonstrates, the public and expressive nature of a public forum – the cacophony of the marketplace of ideas – can be totally inconsistent with the quiet enjoyment of private property. Thus, any purchaser will demand a significant discount for land burdened by a public forum.

Many States, including these *Amici*, own large tracts of open-spaces land as well as numerous discrete parcels within urban areas. Such properties are extremely valuable public assets. Governments sell or trade public lands to raise revenue, promote development and urban renewal, create buffers between different land-use zones, and to acquire more desirable properties. Like any landowner, governments seek to obtain full market value for their lands. Where needed, they

also seek to maximize the benefit to the public by ensuring public access after land is sold.

In other contexts, many States also employ access easements to preserve public access to beaches, parks, and other public lands without obligating the government to bear all the burdens of private ownership. They help cities facilitate pedestrian traffic. They exist not only over undeveloped land but through private gardens, backyards, and even buildings.

The decision below prejudices governments at all levels in the sale of public lands. By almost ensuring that a public forum will exist on private property merely because public access is guaranteed, the court below has forced one of two choices upon State governments: they can either abandon the benefits of legally guaranteed public access and sell the land unencumbered for full fair market value, or they can ensure public access and sell the land at a steep discount. Either way, the public loses.

For the same reasons, State governments within the Tenth Circuit will have great difficulty acquiring public access easements over private property. Many private landowners will not be willing to grant such easements to governments given the disruption a public forum can cause. Others will demand a premium to compensate for the risk and hassle. As a practical matter, the decision below will often make it impossible for State governments to reserve or obtain public access easements over private land.

Ironically, moreover, the decision below will result in very little if any additional speech. It will instead result in less public access and less public revenue.

For all these reasons, the decision below improperly and unnecessarily strips State governments of the power to structure sales of public lands to maximize the public's benefit. For that reason as well, it merits this Court's full attention.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICTS IDENTIFIED IN THE PETITION AND TO CLARIFY HOW GOVERNMENT CAN PROPERLY CLOSE A PUBLIC FORUM.

The doctrinal conflicts identified in the petition are also of great concern to *Amici* and likewise merit this Court's review. In particular, the Petition sets forth the stark conflicts that exist (1) between the Tenth Circuit and the Second Circuit over the proper analysis for determining whether property subject to public access rights constitutes a public forum, and (2) between the Tenth Circuit and the Nevada Supreme Court over whether a walkway on private property subject to a simple public access easement can be deemed a public forum for First Amendment purposes. Although the decision below also conflicts with the clear import of this Court's public forum cases, this Court has never specifically addressed the precise issue of how government can constitutionally terminate a public forum and sell the property to a private owner. Nor has it ever addressed whether, or under what circumstances, a public access easement can give rise to a public forum on private property. These issues are of great and recurring importance to State governments as they deal with land sales and public access issues.

Perhaps the most straightforward and logical statement of how government can terminate a public forum is contained in Justice Kennedy's concurrence in *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 699-700 (1992). Justice Kennedy stated that a public forum can be closed in one of three ways:

> [T]he government always retains authority to close a public forum, by [1] selling the property, [2] changing its physical character, *or* [3] changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require.

Id. (Kennedy, J., concurring) (emphasis added).

The Second Circuit addressed essentially the same factors in determining whether the government-owned Lincoln Center Plaza constituted a public forum and concluded that it did not. *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 546-47, 552 (2d Cir. 2002). But the Tenth Circuit here took a starkly different approach. The record in this case is clear that the City satisfied all of the factors identified by Justice Kennedy in *Lee*. The property was sold to the Church for fair market value, its physical character was dramatically changed, and its principal use was altered (from ordinary street and sidewalk use to a religious plaza). Each factor is independently sufficient to terminate a public forum. Nevertheless, the Tenth Circuit virtually ignored these factors and focused narrowly on the nature of the government's property interest to the exclusion of everything else. Pet. App. 22a.

This Court's review is essential to resolve a classic conflict in an important area of the law. In *Lee*, Justice Kennedy outlined a test that concisely sets forth what is necessary to close a public forum. In *Hotel Employees*, the Second Circuit employed the same analysis to determine that an urban plaza was not a public forum. But in this case, the Tenth Circuit adopted a different analysis that reached the opposite conclusion under very similar facts. Certiorari is necessary to establish which analysis is correct, or to provide some other test to guide both the lower courts in deciding such cases and State and local governments in fashioning property transactions. Review is also necessary to resolve the uncertainty that the decision below has created over whether public access easements necessarily create public forums on private property.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

MARK SHURTLEFF*
ATTORNEY GENERAL
STATE OF UTAH
236 State Capitol
Salt Lake City, UT 84114
(801) 538-1191

BILL PRYOR
ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. Tenth Avenue
Topeka, KS 66612

JON BRUNING
ATTORNEY GENERAL
STATE OF NEBRASKA
2115 State Capitol
Lincoln, NE 68509

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
300 W. Fifteenth Street
Austin, TX 78711

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL
STATE OF WEST VIRGINIA
1990 Kanawha Boulevard East
State Capitol, Room 26-E
Charleston, WV 25305

Counsel for Amici Curiae

April 14, 2003

* Counsel of Record